2

FILE COPY

Office Supreme Court
FILED
NOV 26
CHARLES ELMORE

No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1934

HARRY BERGER,

Defendant-Appellant,
Petitioner,

v.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

INDEX

Petition:	Page
Petition	1
Questions Presented	2
Statutes Involved	2
Statement	3
Indictment	3
The Testimony	4
Specification of Errors to be Urged	7
Reasons for Granting the Writ	7
Brief in Support of Petition:	
Opinions Below	10
Questions Presented, Statutes Involved, etc.	10
Argument	10
Conclusion	36
Appendix	37

CITATIONS

Cases:	
Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334	35
Crawford v. United States, 212 U. S. 183	35
Deery's Lessee v. Cray, 5 Wall. 795	35
Dowdy v. United States, (C. C. A. 4) 46 F. (2d) 417, 423	14
Funk v. United States (C. C. A. 4), 46 F. (2d) 417, 423	14
Gilmer v. Higley, 110 U. S. 47	35
Graves v. United States, 150 U. S. 118	21, 34
Hall v. United States, 150 U. S. 76	21, 34
Holmgren v. United States, 217 U. S. 509	20
Johnson v. United States, 131 C. C. A. 613	34
Lilienthal v. United States, 97 U. S. 237	19
Marcante et al. v. United States, (C.C.A.10) 49 F. (2d) 156	12, 15
Moores v. Citizens' National Bank, 104 U. S. 625	35
Parnell v. United States (C. C. A. 10) 64 F (2d) 324	12
People v. Esposito, 224 N. Y. 370	21
People v. Malkin, 250 N. Y. 185	21
People v. Slover, 232 N. Y. 264	21
Potter v. United States, 155 U. S. 438	19
Smith v. Shoemaker, 17 Wall. 630	35
State v. Kardin, 2 Dev. & B. (N. C.) 407	20
Sykes v. United States, 204 Fe 909	20
Telman v. United States, (C. C. A. 10) 67 F. (2d) 716	12
Terry v. United States (C. C. A. 9) 7 F. (2d) 28	14, 15
Tinsley v. United States (C. C. A. 8) 43 Fed. (2d) 890	12
United States v. McConnell, 285 F. 164	13
United States v. Murphy, 252 F. 404	21
United States v. Siebrecht (C. C. A. 2) 59 F. (2d) 976	15
United States v. Wills (C. C. A. 3) 36 F. (2d) 855	13
Wilson v. United States, 149 U. S. 60	21, 34
Wyatt v. United States, 23 Fed. (2d) 791	13
Miscellaneous:	
16 Corpus Juris, 1143	33
26 Ruling Case Law 1022	33
3 Wigmore, Evidence 837	33
4 Wigmore Evidence 350-372	20

In the Supreme Court of the United States

OCTOBER TERM, 1934

No.——

HARRY BERGER,

Defendant-Appellant,
Petitioner,

v.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

HARRY BERGER, defendant-appellant, by his attorney, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on November 13, 1934, affirming a judgment of the District Court for the Eastern District of New York.

QUESTIONS PRESENTED

1. Whether the misconduct of the prosecuting attorney permitted and condoned by the trial judge, and condemned by the circuit court below, was such a deviation from the usual trial procedure and so prejudicial to the defendant as to have deprived him of a fair and impartial trial and required a reversal of the judgment.

2. Whether corroboration of a discredited co-conspirator is necessary, and in the absence of such corroboration when the testimony is admittedly "not strong", the trial court should direct a verdict of acquittal.

3. Whether there is not a material variance requiring a reversal of conviction or a direction of acquittal when the indictment charges several with a single conspiracy and the proof tends to prove two distinct conspiracies to which only one defendant, not the petitioner, is a common member.

STATUTES INVOLVED

The statutes involved are as follows:

1. United States Code, Title 18, Section 88; which denounces conspiracies to commit offenses against the United States.

2. United States Code, Title 18, Section 263, making it a crime to falsely make, forge or counterfeit any note in imitation, or purporting to be in imitation, of circulating notes issued by any banking association authorized and acting under the laws of the United States, or to pass, utter or publish, or attempt to pass, utter or publish, any such counterfeited note.

3. United States Code, Title 18, Section 265, making it a crime, with intent to defraud, to pass, utter, etc., or to keep in possession, or conceal with intent to pass, utter, etc., any falsely made, forged, counterfeited or altered obligation or other security of the United States.

(Quoted in the appendix *infra*, pages 37-38).

STATEMENT

Judgment of conviction was rendered against the defendant Harry Berger on March 27, 1934 in the United States District Court for the Eastern District of New York, adjudging him guilty of conspiracy together with two other defendants and a third who had pleaded guilty. The defendant was sentenced to be confined in a penitentiary or prison camp for the term of one year and one day. All of the substantive counts except 7 and 8 had been dismissed by the Court and as to these two the petitioner was found "not guilty."

INDICTMENT

The indictment consisted of nine counts. The first eight charged substantive violations of Sections 263 and 265 of the United States Code, Title 18. The first six counts charged uttering and passing counterfeits of notes issued by the Federal Reserve Bank of Dallas, Texas. The seventh and eighth counts charged a like offense with reference to counterfeits of an issue of the Federal Reserve Bank of Chicago, Illinois.

The ninth count charged a conspiracy: "that the defendants did unlawfully, wilfully and corruptly combine, conspire and confederate and agree together * * * with intent to defraud, to possess and keep in their possession and conceal with intent to utter, publish, and pass the same * * * falsely made, forged and counterfeited" notes in the denominations of $20 and $100 "knowing that the said circulatory notes * * * were falsely made, forged and counterfeited, and intending then and thereby to defraud divers persons."

THE TESTIMONY

The record of the testimony is quite voluminous. Comparatively little of it involved the petitioner. The mass of it so colored the trial and the error was so constant that the entire testimony appears in this transcript. For present purposes, however, a brief resume of pertinent testimony appears sufficient.

JACK KATZ, an alleged co-conspirator who had turned State's evidence testified that he met the defendant Rice, whom he had known at Sing Sing (R. p. 137, 139). Rice told him he had an idea where they could make some money buying jewelry from people who advertised in the newspapers such jewelry for sale, paying therefor with counterfeit money (R. .p 143). He proceeded to do that (R. pp. 144-145, 166-170). He met Berger at the apartment of Miss Molnar and Miss Talle. Their first conversation was sometime in the latter part of December, before Christmas. Berger said that one of the girls told him that Katz had counterfeit money and asked to be shown the bills. Katz got one of the $100 bills and showed it to him. Berger said it looked pretty good. Before New Year's Berger introduced Jones to him. Jones asked if he could give him a few of the bills. He called Berger aside and told him he did not know the fellow and asked what type of man he was. Berger said he was O. K. and not to worry about him; Jones would never say anything. Katz spoke to Jones who said he would pass the bills in hockey games in Madison Square. He could get rid of them on the bookies there (R.pp. 158-159). The following night he came back there. Berger and the girls were also there. He gave Berger the four $100 bills as he did not want to hand them to Jones directly; Berger turned them over to Jones and Katz received $100.

Two of these bills were passed by Jones (R. pp. 54,

70-73). He admitted doing so, believing they were good. Jones testified that he had received those bills as his winnings on a bet not from Berger but from a bookmaker for whom Katz was a runner. That he had never been in the girls' apartment and had not met Katz through Berger (R. pp. 406-408).

GODBY and KETT, both secret service operatives, testified that, when first questioned, Berger had admitted taking Jones to the girls' apartment and introducing him to Katz (R. pp. 243-244, 550-551).

Katz, who was the main witness and himself the really active wrongdoer, had a record of five previous convictions.

On September 5, 1921, as Harry Katz, Atlantic City, New Jersey; larceny, sentence suspended; on September 17, 1923, as Harry J. Katz, Atlantic County, New Jersey; grand larceny, indefinite term, Rahway, New Jersey State Reformatory, as Jack Pearce in 1932, no date, Holmesburg, Pennsylvania; larceny, sentenced to one year; on April 5, 1926, as Harry Katz, Los Angeles, California; forgery, three years probation. On April 18, 1929, attempted forgery, firve years in State's prison, by Judge Rosalski.

Katz too had boasted: "I was arrested in every city but not convicted" (R. p. 173). He had received a promise from the Assistant United States Attorney that "If Katz would testify truthfully, that *I would gauge that truthfulness by his testimony heretofore given in various places* • • •" then the eight substantive counts against Katz would be dismissed and a plea to the conspiracy count would be accepted; and Katz would be protected from the other defendants (R. pp. 132 53). Thus the maximum penalty to which he would be subject was reduced from 122 years imprisonment and $50,000 fine to 2 years imprisonment and $10,000 fine (R. p. 176).

He first informed the Secret Service men that he had dealings with Berger on January 15th. This was after Berger had gone to the girls' apartment about 4 o'clock in the morning and found him there with another man (R. p. 202). He stopped being friendly with Berger the night that Berger broke into the apartment when he, the witness, was there with another man (R.p. 220). The other man opened the door after Berger had been pounding on it for a few minutes (R.p. 221). *He is not friendly with Berger and does not feel very good towards him because Berger went to the parole office with his wife and made a statement down there* (R.p. 223). *He did not deny giving a message to an attorney, to carry to Harry Berger's attorney, saying he was sorry he brought Berger into it; that he knew Berger was not guilty* and he did it because he was sore at him and thought he was fooling around with his wife (R. p. 207). Upon examination by the Court, he admitted that Commissioner O'Neil stated he was crazy (R. p. 212).

Katz had also told the bondsman after the arraignment that Berger had nothing to do with the case and was innocent (R. pp. 542, 547).

Berger denied that he had had anything to do with any counterfeit bills ever. He showed that he was in the real estate business, managing large properties, handling large sums of money for his principals and financially comfortable (R. pp. 329-330). He met Katz and the latter's wife at the girls' apartment but never had any dealings with him (R. p. 331). When he found out Katz was an ex-convict, he told her to keep Katz from the apartment (R pp. 331, 336). He never knew Katz was handling counterfeit money (R. p. 337). He never knew Jones to have been at the girls' apartment (R. p. 357) nor did he know that Katz and Jones were acquainted (R. p. 367).

Berger had known Jones because he ate at a luncheonette operated by Jones. He had tried, as broker, to aid Jones in the purchase of a concession (R. pp. 327, 337, 338).

Berger admitted that ten years before, when only twenty years old, he had pleaded guilty to a charge of robbery (R. p. 325). For the following ten years he had led an exemplary life, and nine witnesses (lawyers, brokers, an accountant and former State Senator) testified to his good reputation and character.

SPECIFICATION OF ERRORS TO BE URGED

(1) The Circuit Court erred in holding contrary to decisions of other Circuit Courts that the variance between the indictment and the proof was not material.

(2) The Circuit Court erred in holding that the misconduct of the prosecuting attorney permitted and condoned by the Trial Judge, while an abuse which should have been strictly controlled, was not prejudicial to the defendant.

(3) The Circuit Court erred in affirming a judgment based upon evidence admittedly "not strong", without proper corroboration of the testimony of the discredited and unreliable co-conspirator and where throughout the trial the prosecuting attorney had misconducted himself so as to deprive the defendant of the fair trial to which he was entitled.

REASONS FOR GRANTING THE WRIT

From the proof and as the Circuit Court below agreed, two separate conspiracies, distinct from the single one

alleged in the indictment, were proven. The court below held that immaterial. Such a stand is however contrary to the weight of authority and the holdings of five other circuits. It also appears to be inconsistent with a previous decision of the court below.

Such a variance has been held by the other courts to result in a total failure of proof of the crime charged. The lower court should then have reversed the conviction and the trial court have directed a verdict of acquittal.

It appears also that the proof adduced by the prosecution was so weak as not to satisfy the standard set by the weight of authority in criminal cases. Further while the proof was weak it came only from the lips of a discredited and concededly unreliable co-conspirator. There was a total failure of corroboration. This was an error of law which should be rectified.

The trial court in the instant case also permitted and condoned actions upon the part of the prosecuting attorney which prejudiced the defendant and prevented him from securing a fair and impartial trial. This taken into consideration with the obvious failure of proof explains the reason for the conviction of the defendant.

The course of the trial sanctioned by the Circuit Court was so contrary to the usual and proper course of trial procedure that this Court's power of supervision is petitioned to rectify the error. The injustice of permitting the judgment below to stand will appear clear. The consideration of this Court is further petitioned to make consistent the view of the Circuit Court of Appeals for the Second Circuit with that of five other circuits. These reasons have all been more fully developed and set forth in the brief annexed hereto and made a part hereof.

Wherefore it is respectfully requested that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit for the review of the judgment of that Court.

November 23, 1934.

HARRY BERGER,

By

NATHAN D. PERLMAN,
Attorney.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The United States District Court for the Eastern District of New York wrote no opinion. The Circuit Court of Appeals for the Second Circuit handed down an opinion which is annexed to the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 13, 1934. The jurisdiction of this court is invoked under Section 347 (a) Title 28 United States Code (Judicial Code Section 240a as amended by the Act of February 13, 1925).

QUESTIONS PRESENTED, STATUTES INVOLVED, ETC.

A statement of the questions presented, the statutes involved, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT

I.

The indictment charges an agreement among and between all of the defendants and other unknown persons to utter and pass the counterfeit notes. Katz pleaded guilty and Rice, Jones and Berger were found guilty of it. To sustain the verdict it must be considered then, that all were acting in concert. The proof discloses a different situation, however.

Katz testified to the purpose or plan: he and Rice were to buy rings from people who had advertised them in the

papers, and to pay for them with counterfeit bills (R. p. 143). That was the sole conspiracy according to the Government's main witness. Jones and Berger did not have any part.

If the facts alleged by the prosecution are considered in the light most favorable to the Government, it appears that Katz, Berger and Jones were engaged in a distinct and separate enterprise, the object of which was to permit Jones to pass some of the bills in an undetermined manner. No matter how the facts are scrutinized it is impossible to connect Rice with Berger. The evidence does not show any mutual plan or understanding between Rice and Berger, nor that their minds met to pass the bills as alleged in the indictment. True, it may be taken that conspiracy has been proven. But it becomes obvious that there must have been two conspiracies: (1) the agreement between Rice and Katz; (2) the agreement between Katz, Berger and Jones.

The Circuit Court below agreed:

> "As we have said, the original arrangement was between Katz and Rice, and contemplated a limited use of the bills; that is, to buy rings. When Katz engaged Jones through the intervention of Berger, it was to pass the bills to tradesmen, and Rice knew nothing of it. Nor did Berger or Jones know that Katz was associated with Rice; though Jones was acquainted with Rice. So far as they knew, Katz might have got the bills from anyone. Thus the evidence really showed two separate conspiracies; one of Katz and Rice, the other of Katz, Berger and Jones, with no connection except that Katz was a common member to both schemes, and that both concerned the utterance of the same bills. The question is whether it was error not to dismiss the case for a material variance, as Berger's attorney moved at the close of the evidence."

The Court held this variance not material stating:

> "• • • It is indeed no answer to a bad practice to say that worse is tolerated already, but it is something to remember that in trials for this crime the latitude is wide. At any rate we are not content to dispose of the cause by the absolute doctrine that appears to have been accepted elsewhere; we believe that the error must be such as to 'affect the substantial rights of the parties'. (Sec. 391, Title 28, U. S. C.)"

The rule is otherwise in every circuit which has passed upon the question. In fact a variance of the type here found has always been considered a failure of proof.

In *Marcante et als.* v. *U. S.* (C. C. A. 10) 49 Fed (2d) 156, 158, numerous defendants were charged with conspiracy to violate the National Prohibition Law. The Court said:

> "The difficulty is that the proof discloses nothing except one group conspiring with Irving to sell liquor in one locality; another group conspiring with Irving to manufacture liquor in another. Two conspiracies not alleged are proven, and there is no proof of the single conspiracy alleged."

The same principle was reiterated by the same Court in *Parnell* v. *U. S.* (C. C. A. 10) 64 F. (2) 324, and *Telman* v. *U. S.* (C. C. A. 10) 67 Fed. (2d) 716, 718. In the latter case, the Court distinctly said:

> "Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction."

In *Tinsley* v. *U. S.*, 43 Fed. (2nd) 890, (C. C. A. 8), the indictment charged conspiracy to steal horses. The proof

showed that Tinsley had acted with Paul Widow and Philip Lone Eagle and that each had stolen horses pursuant to arrangement with Tinsley. The Court held that such proof disclosed two separate and distinct conspiracies and not the single conspiracy charged in the indictment; and that the verdict against Tinsley could not be sustained.

Similarly in *U. S.* v. *McConnell*, 285 F. 164, the Court said:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view and that each of four groups of persons were cooperating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

And in *United States* v. *Wills*, 36 Fed. (2nd) 855, 859, the Circuit Court of Appeals for the Third Circuit said:

> "* * * when the government by the first indictment charged one conspiracy and proved others it did more than fail to prove the conspiracy charged; it proved other conspiracies not charged and thus created a variance which was complete in the technical sense and material in the sense of the law."

The same court had well and vigorously stated in *Wyatt* v. *United States*, 23 Fed. (2d) 791:

> "Having a responsibility for the enforcement in this circuit, not only of the National Prohibition Law, but of federal laws generally, we are strongly

> of opinion that the conspiracy statute should not be stretched to cover and be misused to convict for offenses not within its terms, and that, when resorted to, the conspiracy alleged must be proved as charged. When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. *Terry* v. *United States* (C. C. A.) 7 F. (2d) 28, 30; *United States* v. *McConnell* (D. C.) 285 F. 164, 166."

In *Dowdy* v. *United States*, and *Funk* v. *United States* (C. C. A. 4) 46 F. (2d) 417, 423, the indictment alleged a conspiracy between all the defendants and one Martin to violate the National Prohibition Act. The proof disclosed that Martin and Dowdy acted together and Martin and Funk worked in concert. The court held that Dowdy's conviction could not be sustained for (one reason) he was convicted of a conspiracy separate and distinct from the conspiracy charged.

Similarly in *Terry* v. *United States* (C. C. A. 9) 7 Fed. 28, it was pointed out that the proof and not the indictment is the determining factor as to the crime. While both crimes proven may come within the scope of the indictment, the broad terms of the indictment setting forth but a single conspiracy cannot be deemed to embrace the similar yet different crimes proven. "The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it."

Thus we see the Circuit Courts for the Third, Fourth, Eighth, Ninth and Tenth Circuits clearly opposed to the decision of the lower court herein. Strangely enough the

Court below has handed down a decision in *U. S.* v. *Siebrecht et al.* (C. C. A. 2) 59 F. (2d) 976, which is not only consistent with the rules of the other circuits but opposed to its own decision herein. True the cases may be distinguished by showing that one of the conspiracies proven in the Siebrecht case had been barred by the Statute of Limitations, but the distinction is artificial. In the within case the Circuit Court did thus attempt to reconcile its decisions, claiming that the variance was material in the Siebrecht case because of the bar of the Statute. It is interesting to note, however, that in deciding that case, the Court did not base its view of material variance upon the bar of the statute. After having shown that a single conspiracy had been alleged and two proven the Court unqualifiedly said:

> "There was, we are persuaded, a failure of proof of the single conspiracy alleged, which amounted to a fatal variance."

In no part of its opinion in that case did the Court even hint that because of the Statute of Limitations the variance was prejudicial. In fact it adopted the view of the other Circuits Courts (see *Terry* v. *United States, supra*, and *Marcante* v. *United States, supra*) that the variance results in a failure of proof when it held:

> "Thus the Court relied wholly upon a single conspiracy of which we think there was insufficient proof."

The decision of the court below on this point is therefore at variance with its own decision as well as in conflict with decisions of five other courts of even jurisdiction.

II.

The main facts in the testimony involving Berger have been set forth in the petition. They have, however, there been stated in a manner most favorable to the respondent. Still it must appear obvious that the proof against Berger was extremely weak, even if credible. The Circuit Court admitted "that the case against Berger was not strong" and that the proof "depended chiefly upon the testimony of Katz, who turned State's evidence against the rest, who had been several times convicted of other crimes, and who was a *thoroughly unreliable person.*" (Italics ours.)

Katz—the thoroughbred criminal, the man who had been arrested in every city, who had been convicted five times previously, the one really active in passing the counterfeit bills and guilty on all nine counts, the witness who admittedly bore a grudge against Berger, the squealer who furnished information to save his own hide, the guilty one who was to receive at most a sentence of two years (if he testified in a manner satisfactory to the Assistant United States Attorney), instead of a possible one hundred and twenty. He was the only real witness against this defendant.

And what was the story that he fabricated with a mind intent on revenge? That Berger had received the notes from him and at the same instant turned them over to Jones. Not that Berger was to pass the notes. Not that Berger was in any respect to profit from the transacion. Not that Berger had anything to do with counterfeit bills at any time other than to see that Jones got them.

Does it not seem ridiculous that Berger, who was attempting to forget his previous conviction by leading an exemplary life, should even touch the things? If he were to get something out of it, it might be more logical. If he was hard pressed and needed money, his connection

with such an enterprise might be understandable. But that was not his condition. His business appeared to be prosperous, both in the brokerage and management lines; he maintained an expensive car and associated with rich and prominent people. The probabilities all point to the falsity of Katz' testimony.

The only other testimony against Berger was that of Godby. He testified that Berger admitted taking Jones to the girls' apartment. But Godby is the Secret Service operative who came down from Elmira at the call of his friend on the Daily News. That there were innumerable operatives close at hand was immaterial (R. p. 245-248). The feather was to be in Godby's hat, and he left no chance of losing that feather. His testimony shows it (R. p. 266, 569-582). He seemed willing to inject anything into his testimony. His overanxiety got him into difficulty. Desirous of showing Berger to be an ex-convict, he stated Katz met Berger in Sing Sing. His embarrassment was obvious when he was shown that Berger left Sing Sing four years before Katz got there and that while Berger was in prison, Katz was in California. He resorted to feigned poor memory. But his memory of statements by Berger seemed clear—all too clear. Yet although statements were taken from every single one of the other defendants, he took none from Berger. That fact alone arouses inquiry. None of the operatives or the Assistant United States Attorney made any effort to explain that, even though it was admittedly the custom to make statements. Kett sought to come to his aid on rebuttal but his testimony cannot be considered of moment since he had failed to connect Berger on the direct case.

Yet taking their testimony at its face value, it still does not prove Berger guilty. What if he did introduce Jones to Katz? There is no proof that such introduction was

for an insidious purpose, no hint that it was to aid the perpetration of a fraud.

Opposed to this equivocal testimony and Katz' obviously false statements we can pit the testimony on behalf of the defendant. Berger and Jones categorically and unequivocally denied Katz's allegations. Both clearly showed that Berger had not introduced Jones to Katz. Jones showed the manner in which he had received the counterfeit bills. A fine array of character witnesses proved the splendid reputation Berger had developed since his conviction. Berger also showed how Katz had believed the defendant was fooling around with Mrs. Katz and started to wreak his vengeance. He showed, too, how Katz, having found out this was error, was anxious to release Berger. We do not have to accept Berger's statement on this alone. Herman Wasserberger, the bondsman, corroborated it. But, better still, is Katz's admission that he didn't feel good toward Berger, and Godby's admission that Katz had first gone to the Daily News to press alienation of affection charges before proceeding with the counterfeiting charge.

It may well be asked, "Why, if Katz had agreed to withdraw his false accusation against Berger after realizing that Berger had nothing to do with his wife, did he persist in them at the trial." The answer is all too clear. Mr. Singer said:

> "If Katz would testify truthfully, that *I would gauge that truthfulness by his testimony heretofore given in various places* • • •"

then Katz would receive certain consideration, as the dismissal of the substantive counts. The Assistant United States Attorney was out to convict as many as possible,

he did not desire to see Berger let off. Katz did not renege because he feared to renege—the extent of the consideration was at stake.

Can one then consider Katz's testimony of any value? Can one find in the combination of the testimony of Katz, Godby and Kett any proof, which, even overlooking the defense testimony, demonstrated the guilt of this defendant beyond a reasonable doubt?

Yet the law is well settled that a person accused of crime is presumed to be innocent until the contrary is proven, and that such guilt can only be shown by proof beyond a reasonable doubt.

Lilienthal v. *U. S.*, 97 U. S. 237;
Potter v. *U. S.*, 155 U. S. 438.

This Court has said (*Lillienthal* v. *U. S.*, *supra*):

> "In all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment. *Com.* v. *McKie*, 1 Gray, 64; *Com.* v. *York*, 9 Metc., 125; *Com.* v. *Webster*, 5 Cush., 305; *Com.* v. *Eddy*, 6 *Gray*, 584; *Com.* v. *Wright*, Bep. & H., L. C. Cas., 229."

With the proof on the part of the prosecution remaining insufficient to overcome the presumption of innocence corroboration of Katz became important.

True, the early Common Law required no corroboration of the testimony of accomplices or conspirators. But the uncertainty and irresponsibility of such evidence was clear, especially where promises of immunity or favor were usually given. The general view then came to be that some corroboration was necessary. As early as 1838

we find it required in this country. (*State* v. *Kardin*, 2 Dev. & B. (N. C.) 407.) Now New York and at least half the States have enacted statutes making it imperative. The general rule seems to be that while a conviction may be sustained on the uncorroborated testimony of an accomplice, some corroboration is necessary. (4 *Wigmore on Evidence*, pp. 350-372.)

In *Holmgren* v. *U. S.*, 217 U. S. 509, 524, this Court said:

> "It is undoubtedly the better practice to caution juries agains too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them."

In *Sykes* v. *U. S.*, 204 F. 909, 913, the Court said:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. • • • And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition that another was an instigator or a participator in the perpetration of her crime is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke* v. *State*, 68 Neb. 154."

In the instant case, one may well look in vain for corroboration of Katz's testimony against Berger. No one, other than he, connected Berger in any respect with the counterfeit bills. That his testimony is unreliable is clear. He admitted not feeling friendly toward Berger. Three times he admitted Berger was innocent and stated that he would change his testimony accordingly. From Godby's

testimony, it seemed as if Katz was trying to charge Berger with alienation of affections. That Katz was believed crazy by the Commissioner was recognized although Katz at first denied it. That Katz had five times previously been convicted and once under an alias was admitted, although Katz at first had sought to conceal several of the convictions and had denied the alias. That Katz had been promised what must be deemed excessive consideration must be recognized. In the place of a possible sentence of one hundred and twenty years, for testifying he was to receive at best two (R. pp. 207, 212, 223, 349, 542).

Can it be believed that Katz then left the stand unshaken and unassailed? The record discloses that he was completely discredited. Certainly then corroboration became not merely a cautious aid to the jury but an actual necessity. *United States* v. *Murphy*, 252 Fed. 404.

Failing corroboration there was a failure of proof and it became the duty of the trial court to direct a verdict of acquittal.

III.

Our system of jurisprudence has maintained one proposition as the beacon of our enlightenment—that a defendant accused of crime is entitled to a fair and impartial trial. This has been scrupulously maintained by our appellate courts when individuals, always human, have by attack on public welfare become blinded to justice by the desire for vengeance in the name of public interest.

Graves v. *U. S.*, 150 U. S. 118;
Wilson v. *U. S.*, 149 U. S. 60;
Hall v. *U. S.*, 150 U. S. 76;
People v. *Slover*, 232 N. Y. 264;
People v. *Esposito*, 224 N. Y. 370;
People v. *Malkin*, 250 N. Y. 185.

That the prosecuting attorney in any case has much to do with the manner of conduct of the trial and that he can influence the atmosphere of such a trial is clear. That there is a burden upon the District Attorney as a quasi-judicial officer to aid and maintain the proper judicial atmosphere and in doing so to prosecute the defendant solely on the facts of the case and by legitimate methods is well recognized. Improper questions, statements not based upon evidence, brow-beating of witnesses and excessive argumentativeness is forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the District Attorney is recognized as a public officer who has apparently no interest in the case and who is at heart an altruist and interested solely in obtaining justice.

A study of the record in the instant case discloses that this defendant did not receive the fair and impartial trial to which every defendant is entitled. It also discloses that the prosecuting attorney went beyond the limits of non-partisanship and impartiality and attacked the defendant and the case with the virulence and venom of the nearly barbaric advocate who tilted in the lists for the case of his principal. But the age of defenders and trials by combat has long since gone. Our civilization at least in its Penal Law and procedure prides itself on having through evolution completely annihilated primativeness and barbarity. Yet occasionally, as here, our consciousness of civilization is pricked by ugly throw-backs.

Almost at the outset of the trial the Assistant United States Attorney makes clear his disposition. After an objection had been made he stated:

> "I do not mind your objecting but if it is an act to disconcert this witness you won't get away very long." (R. p. 151.)

His quarrelling with counsel for the defense at the time is not only ludicrous but actually scandalous. That the austere and dignified atmosphere of the court must have been disturbed by such actions is obvious (R. pp. 172, 219-220, 222-223). His attitude is well displayed by this (R. p. 248):

> "Q. So you have the whole picture before you as he painted it for you?
>
> Mr. Singer: He did not paint anything. Stop the picture talk.
>
> The Court: Go ahead.
>
> Mr. Kamber: I withdraw the word 'paint'.
>
> The Court: You had better ask the question without the word 'paint'.
>
> Q. So he told you this entire story and you took it in for all it was worth?
>
> Mr. Singer: Let us not have any of that either.
>
> The Court: I will let that go."

And a short time later after a question had been asked and objection made defense counsel offered to withdraw the inquiry to save time; the Assistant United States Attorney replied:

> "Do not save time, save yourself" (R. p. 249).

And later:

> "Q. Did you tell this ex-convict——
>
> Mr. Singer: Let us not have that.
>
> The Court: We are talking about Katz.
>
> Mr. Singer: He is not the only ex-convict" (R. p. 249)."

Jones' cross-examination (R. pp. 410-418) consists of one long argument between the Assistant United States Attorney and that defendant.

Cross-examination of the defendant Rice too (R. pp. 514-538) gave the Assistant United States Attorney further opportunity to display his argumentativeness.

And during the defendant Berger's direct examination Mr. Singer continued his habit of interrupting:

> "Q. You have an automobile? A. A twenty-five hundred dollar car.
>
> Mr. Singer: That is a new defense. You do not need money.
>
> The Court: He can show the whole situation.
>
> Mr. Singer: That is a new defense." (R. p. 329.)
>
> "Mr. Singer: What is that?
>
> Mr. Wegman: Never mind; I consent that it be stricken out.
>
> Mr. Singer: Never mind about striking that out. Let him go and tell how I know her; let us hear about it.
>
> The Court: What has that to do with Mr. Singer?
>
> . . . . . .
>
> Mr. Singer: Is that all? I thought I was in that apartment with the gun.
>
> Mr. Wegman: There has been no suggestion of that altogether, and you know it.
>
> Mr. Singer: There might have been."
>
> (R. pp. 340, 342.)

The persistent unfairness of the Assistant United States Attorney is clear on the cross-examination of the defendant Berger. Right at the beginning he purposely mis-states the defendant's testimony:

> "Q. The man who didn't have his pants on and was running around the apartment he wasn't there? A. No, Mr. Singer. Mr. Godby told me about it, if you want it, I will tell you, he told me 'If you give this man's name out, I will give you the works.'

Q. Give me the works? A. No, sir. Godby told me that.

Q. You are going to give me the works? A. Mr. Singer, you are a gentleman, I have got nothing against you. You are doing your duty.

Mr. Wegman: You are not going to give Mr. Singer the works. Apparently Mr. Singer misunderstands you. Who made that statement?

The Witness: Mr. Godby says that.

Q. Wait a minute. Are you going to give me the works? A. Mr. Singer you are absolutely a gentleman, in my opinion, you are doing your duty here.

Q. Thank you very much. But I am only asking you are you going to give me the works? A. I do not give anybody such things, I never said it.

'Q. All right. Then do not make the statement." (R. p. 350.)

His brow-beating of the defendant is seen throughout the case:

"Q. I wasn't in that apartment, was I? A. No, Mr. Singer.

Q. I didn't pull the gun on you and stick you up against the wall? A. No.

Q. I wasn't up in this apartment at any time, as far as you know, was I? A. As far as I know, you weren't.

Q. You might have an idea that I may have been there? A. No, I should say not.

Q. I just want to get that part of it straight." (R. p. 351.)

And then concerning the defendant's pistol permit:

"Q. In this renewal for 1933 you had stricken out the fact that you wanted it on the premises but you wanted to carry it in your pocket? A. That is not true.

* * * * * * * *

Q. I did it I suppose? A. I didn't say you done it Mr. Singer.

Q. I thought you did it, so here somebody was framed again? A. * * *" .

(R. p. 380.)

Concerning a matter that had absolutely nothing to do with the defendant and the trial, the prosecutor was permitted to cross-examine the defendant viciously in what takes up six full pages of the record (R. pp. 382-388), as to whether or not Mr. Singer had given Miss Wishnu his telephone number, as to the reason for his having done that, and as to whether or not Miss Wishnu had any connection with this case or whether she had been let off by Mr. Singer.

The Assistant United States Attorney also unfairly and unnecessarily went into great detail concerning the relations of the defendant and Miss Talle, as to what he did at her apartment, how often he stayed there, whether he slept there over night, whether he had a right to indulge in what he did, and whether it degraded him. Clearly such facts had no bearing upon the issues of the case or upon the credibility of the defendant (R. pp. 364-368).

The defendant had testified to making an effort to find out the name of the man who with Katz had been at the girls' apartment the night when Berger went there. Then the Assistant United States Attorney asked the defendant if Mr. Godby, the secret service operative, had been in the apartment. The defendant knew he had. He then asked:

"Q. You do not claim Mr. Godby had anything to do with those girls, do you?"

He then asked the same question concerning Agent Fitzgerald. The defendant insisted he couldn't swear for anybody else. The Assistant United States Attorney still persisted on the point:

> "Q. Do you include as those who may have been there, the Court and all the jurymen, and your own counsel?"

Defendant's attorney interfered, but the Court stated:

> "I am not going to stop him because the question includes the Court. I will let him answer it."

The predicament of the defendant is clear. His answer was obvious: "I should say not, that is ridiculous." But counsel would not leave that alone and insisted on following it up:

> "Q. It is ridiulous to include the Court, and the jury and your own counsel but it is perfectly feasible to include Mr. Fitzgerald, and Mr. Godby and myself. That is your answer, that is all. A. No."

Right thereafter the Court repeated to the jury:

> "He has answered that question, that it is none of you." (R. pp. 391-393.)

At the end of this defendant's cross-examination the following took place:

> "Q. Now, Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that?
> A. I do, Mr. Singer.
> Q. You talked to me out in the hall? A. I talked to you?
> Q. Yes? A. No.

Q. *You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take careof you'? You didn't say that yesterday?* A. No; I didn't, Mr. Singer, you are lying.

Q. I am lying, you are right. You didn't say that at all? A. No.

Q. You didn't speak to me out in the hall? A. I never did speak to you outside since this case started, except the day I was in your office, when you questioned me.

Q. I said yesterday. A. No, Mr. Singer.

Q. Do you mean that seriously? A. I said no.

Q That never happened? A. No, Mr. Singer, it did not.

Q. You did not say that to me? A. I did not. What do you want me to answer you?

Q. *I want you to tell me I am lying, is that so?*

A. I told you that once.

Q. No question about that at all?. A. No question about that." (R. pp. 393-394.)

The Assistant United States Attorney's propensity for making statements injurious to the defendant and actually inadmissible in the guise of questions, is clear from the following:

"Q. Didn't you tell me, Mr. Wasserberger, and I am sorry you brought this up, but as you took the stand you are going to be bound by it, *didn't you tell me that the only reason that you wanted to get those girls out for Berger was because you felt if you could get them out on bail they would not say anything about Berger?*" (R. p. 544.)

During the defendant's cross-examination too the Assistant United States Attorney, although there was no evidence to that effect, asked the following questions:

"Q. You never told us about the time Jones and you came up to the girls' apartment?"

And then followed it up:

> "Q. *Didn't you tell me you brought Jones up there?*"
> "Q. *I am lying?* • • •
> Q. *Do you say now that you never told me?*" (R. p. 357.)

And later on:

> "Q. Didnt' you tell me up at the District Attorney's Office that it was your girl friend, Miss Siegel or Talle who had informed the police that you had a pistol permit and you had a criminal record!" (R. p. 362.)

It will be noted that in spite of all this no statement of this defendant was offered in evidence, for he did not make any such statement, and Mr. Singer did at no time attempt to take the stand to testify as to the conversations he had with this defendant.

In his summation, counsel for the Government, continued in the same manner in which he had persisted throughout the examination of witnesses. He opened with a malicious attack on defense counsel (R. pp. 614-616). Then he, again, proceeded to inject statements of alleged fact which were not in evidence: "he seems to forget too that this man was arrested long before he ever heard of this lawyer • • •" (R. p. 618). He proceeds to accuse Berger, without foundation in evidence, of leading a dual existence, of having fooled his friends and asserting that the character witnesses knew nothing about this defendant (R. p. 621):

> "But no, each and every single character witness called here testified that they didn't know anything about Berger, because Berger, just like the last

man, Rice, was leading a complete double life, Dr. Jekyll and Mr. Hyde, in the flesh before you, the two of them.

* * * * * * * * *

"Well, that is a part of his nature, that is a part of his life, to attempt to fool his own friends, and that is what the testimony shows here."

"Well, if they were (his social intimates) he certainly fooled them, and I know he won't fool you. That is the point, you see. Every argument must come back to the one point. He fooled his friends, and they all said so. Is he going to fool any one of you?"

Mr. Wegman: Now, if your Honor please, I ask that the District Attorney be instructed to correct that mis-statement of fact.

The Court: I do not think that kind of interruption should be made. This is argument, he is not stating the evidence. If you have any exceptions, you can take them at the close of the argument.

Mr. Wegman: There is no evidence that he fooled any of his friends.

The Court: Go ahead.

Mr. Singer: I say to you again that he fooled those friends. Not a single one of them knew about him, because if they knew what he was doing over there at West 57th Street, if they knew of his association with these thieves, the men that Kamber called thieves, the man that his own lawyer called a rat, do you think that these honorable men would have come here and given testimonials as to his good character? *You have got the right to assume, you have got the right to think that he fooled them,* and to say to yourselves, 'This baby won't kid me.'"

Then still more savagely, having repeated the incidents of the notary and pistol permit applications, he repeats with each breath the word "liar" and ends:

"And if what his own lawyer says is true, if a man lies in one matter he may lie in everything so throw out everything he says, and *throw Berger at last where he really belongs.*"

Although Berger had no connection with the passing of the bill on Mrs. Goldstein, and all the Government witnesses so agreed, Mr. Singer attacked her, his own witnes, in an effort further to prejudice Berger, and into his argument again injected his alleged personal knowledge:

"Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew Berger. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.' You know the rules of law. Well, it is the most complicated game in the world. I was examining a woman that *I knew knew Berger and could identify him*, she was standing right here looking at him, and I couldn't say, "Isn't that the man?' Now, imagine that. But that is the rules of the game, and I have to play within those rules."

. . . . . .

"Now, she finally got to see Berger, somebody had to almost pick him up and throw him in her lap——

Mr. Wegman: If your Honor please, I have got to object to this. I object to counsel——

The Court: Mr. Singer, nobody picked him up and nobody put him in her lap.

Mr. Singer: I didn't say that.

Mr. Wegman: It is unfair to state that.

Mr. Singer: 'Stand up,' said I, and when he stood up she said, 'Yes,' and then tried to explain it, explain the reason why she had failed to identify him before. She said, 'Well, it looks like there was something different about him now and then.'

From that time on everybody was laughing when the statement was made, 'Did he have a moustache?' Nonsense! She knew him when she took the stand. *You must remember, Jones had been to see her after he had been released. Remember, you are not dealing with a lot of ignorant school children.* Isn't it peculiar that she couldn't identify him when she was over there? Doesn't that sound ridiculous to you? Use your brains, and you can find out what was behind the failure to identify him. *They weren't slipping anything over on me. I knew before the case was over she would pick him out or be a sorry lady.*"

* * * * * * *

"It was a pretty tough break that she had to identify Jones, and if she could have avoided it I believe she would have, and *she tried to avoid identifying Berger*——

Mr. Wegman: I object to that.

Mr. Singer: (Continuing)—but her luck didn't hold out.

Mr. Wegman: I object to that."

* * * * * * *

"Mr. Singer: Gentlemen, you make your own minds up as to why she couldn't identify him at first, and I won't attempt to encroach at all on your own opinion."

Among other facts not in evidence we not the Assistant United States Attorney saying:

"*Oh, you have his good pal Berger, who was not only taking care of him in a business way, but also was taking care of him up at this apartment where there were some ladies of pleasure.*"

What more than this did the jurors need to hear from a quasi-judicial officer before convicting:

"It (reasonable doubt) means, 'I got a conscience, I got a job, I am on the jury and I swore an oath to be a good, honest juror. Am I satisfied in my mind that these men committed a crime? If I am I will convict them; and that is your reasonable doubt. Of course, if you didn't want to take the job as jurors you should have refused and said, 'I do not have the heart, I do not have the moral fibre or strength to judge my fellow man. I would rather duck the issue and leave it for somebody else!' But *you took the job, and I am going to hold you strictly accountable to your oath.*"

A summary finds that the Assistant United States Attorney in his zeal was guilty of almost every act of misconduct which has many times been proclaimed error:

"Altercations between counsel, including imputation as to veracity, interjection of prejudicial matter by way of remarks during the trial, asking incompetent questions, merely for purpose of prejudice, the improper browbeating of witnesses, * * * improper argument to the jury." 26 Ruling Case Law 1022.

"Persistence of the prosecuting attorney in asking improper questions in order to prejudice the jury may amount to such misconduct as to require a new trial." (Citing:) *State* vs. *Greenland,* 125 Iowa 141; *Baldwin* vs. *State,* 11 Oklahoma Criminal Reports 228; *State* v. *Roscon,* 119 Iowa 300 Corpus Juris, Vol. 16, p. 1143.

"A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. * * * Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit * * * To bring forward in argument an assertion of fact * * * is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the Hearsay rule." 3 Wigmore Evid. 837.

> "The same gentral principle governs the putting of questions to witnesses The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question." *Id.* 850.

That the misconduct of counsel for the prosecution during the trial prejudiced the defendant and his case so as to deprive him of a fair and impartial trial is clear. *Johnson* v. *U. S.*, 131 C. C. A. 613, 3 Wigmore Evid. Sec. 1808; *Graves* v. *U. S., supra*, *Hall* v. *U. S. supra*, *Wilson* v. *U. S., supra.*

Upon these matters the court below in its opinion said:

> "It is indeed true that this officer failed in moderation and good taste, we might have been better content had, the trial judge seen fit to keep him more closely in hand than he did."

It termed the actions of the prosecutor an "abuse of his position". It further said:

> "More can be said as to these questions which he put to Berger implying that Berger had made declarations to him, contradictory of what he swore to on his direct. That common device is an abuse which ought to be strictly controlled at times even at the cost of a mistrial if need be. But again, it would be extravagant now to reverse the conviction on its account, for it is fantastic to suppose that it substantially determined the outcome. If it colored the whole as perhaps it did, and as it was certainly intended to do, the shade that it added we can scarcely detect, today when mere possibilities do not interest us as they did our forerunners; we demand more tangible evidence that damage has been done."

With the proof against the defendant admittedly so weak, the actions of the prosecutor became important. It hardly seems credible that the conviction would be based on the facts. The only proper conclusion is that the attitude of the Assistant United States Attorney and the atmosphere he created aroused prejudice against the defendant, resulting in the verdict.

The presumption is that error produces prejudice, and it is only when the fact so clearly appears that an error challenged did not prejudice and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. *Smith* v. *Shoemaker*, 17 Wall. 630, 639; *Deery's Lessee* v. *Cray*, 5 Wall. 795; *Moores* v. *Citizens' National Bank of Piqua*, 104 U. S. 625, 630; *Gilmer* v. *Higley*, 110 U. S. 47; *Boston & Albany R. R. Co.* v. *O'Reilly*, 158 U. S. 334; *Crawford* v. *United States*, 212 U. S. 183.

The view of the Circuit Court below is thus contrary to the rulings of this Court and the evident weight of authority. Further, by its decision, the court below has sanctioned such a departure from the usual and proper course of procedure as to call for the exercise of this court's power of supervision.

CONCLUSION

It is submitted that the decision of the Circuit Court was erroneous in determining the within case in a manner in conflict with decisions of other Circuit Courts and the weight of authority; in condoning the departure from the usual and proper course of trial procedure. The decision is grossly and manifestly unfair and improper and calls for the exercise of this Court's power of supervision.

November 23, 1934.

Respectfully submitted,

NATHAN D. PERLMAN,
Attorney for Petitioner,
Defendant-Appellant.
Office and P. O. Address,
475 - 5th Avenue,
New York City, N. Y.

Of counsel,
SYDNEY ROSENTHAL,
and
SYDNEY S. SNYDER,
(Both of 10 Court Square,
Long Island City, N. Y.)

APPENDIX

Section 88 (Criminal Code, Secton 37) Conspiring to Commit Offense Against United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1929, c. 321, Sec. 37, 35 Stat. 1096.)

Section 263 (Criminal Code, Section 149) Counterfeiting National Bank Notes

Whoever shall falsely make, forge, or counterfeit, or cause to procure or be made, forged or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or whoever shall pass, utter, or publish, or attempt to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business knowing the same to be falsely made, forged, or counterfeited; or whoever shall falsely alter, or cause or procure to be falsely altered, or shall willingly aid or assist in falsely altering, any such circulating notes, or shall pass, utter, or publish, or attempt to pass, utter, or publish as true, any falsely altered or spurious circulat-

ing note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be fined not more than $1,000 and imprisoned not more than fifteen years. (R. S. 5415; Mar. 4, 1909, c. 321, Sec. 149, 35 Stat. 1115.)

SECTION 265 (CRIMINAL CODE, SECTION 151) UTTERING FORGED OBLIGATIONS

Whoever, with intent to defraud, shall pass, utter, publish, or sell or attempt to pass, utter, publish, or sell or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years. (R. S. Sec. 5431; Mar. 4, 1909, c. 321, Sec. 151, 35 Stat. 1116.)